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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DENNIS SHAW, Plaintiff and Appellant, v. I-SAFE, INC., Defendant and Respondent.	D073721 (Super. Ct. No. 37-2016-00019181-CU-JR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Laura H. Parsky, Judge. Affirmed.

Jenkins Mulligan & Gabriel and Daniel J. Mulligan for Plaintiff and Appellant.

Littler Mendelson, Vani Parti and Denise M. Visconti for Defendant and Respondent.

This case arises out of an employment dispute between Dennis Shaw and I-Safe, Inc. (I-Safe). After a bench trial, Shaw was awarded damages, including interest, in the amount of $29,505.68. The court also awarded Shaw $46,062 in attorney fees and $3,228.98 in costs.

Shaw appeals, contending the court's interest calculation in the judgment was incorrect, the judgment orders an impossibility, and his vacation time and pay were not properly calculated. Additionally, Shaw claims the court abused its discretion in awarding attorney fees and costs in an amount less than what he requested.

I-Safe counters that Shaw's arguments are without merit, specifically pointing out the lack of an adequate record on appeal to analyze the issues before us. I-Safe also maintains that Shaw's appeal is frivolous, and thus, sanctions are warranted. We agree with I-Safe that Shaw's claims are meritless, and thus, affirm the judgment. However, on the record before us, we determine sanctions are not warranted.

FACTUAL AND PROCEDURAL BACKGROUND

Shaw appeals a judgment following a bench trial. The record does not contain a reporter's transcript of the trial. In his appellate brief, in challenging the judgment, Shaw does little more than to cite to the trial court's statement of decision. He claims he is not challenging the sufficiency of the evidence, but instead, is presenting issues of law. However, he asserts the court made an improper finding of fact relating to his compensation for accrued, unused vacation time. No matter how Shaw labels such a question, it involves a substantial evidence review. Such a review is not possible on an incomplete record. (See *Gonzalez v. Rebollo* (2014) 226 Cal.App.4th 969, 977 ["[w]ithout a complete record, we are unable to determine whether substantial evidence supported the implied findings underlying the trial court's order"]; *Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1412 ["[t]o the extent the court relied on documents not

before us, our review is hampered," and we "cannot presume error from an incomplete record"].)

The lack of an adequate record does not only hurt Shaw's substantial evidence challenges. On appeal, the judgment of the trial court is presumed to be correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) Accordingly, if the judgment is correct on any theory, the appellate court will affirm it regardless of the trial court's reasoning. (*Estate of Beard* (1999) 71 Cal.App.4th 753, 776-777; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.) All intendments and presumptions are made to support the order on matters as to which the record is silent. (*Denham*, at p. 564.)

An appellant has the burden to provide an adequate record and affirmatively show reversible error. (*Denham*, *supra*, 2 Cal.3d at p. 564; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) Further, it is the appellant's duty to support arguments in his or her briefs by references to the record on appeal, including citations to specific pages in the record. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 (*Duarte*).) "Appellate briefs must provide argument and legal authority for the positions taken. 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' " (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.) "We are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.)

Here, in the absence of any reporter's transcripts of the bench trial, we take the factual background from the findings of fact contained in the statement of decision.

Shaw was a principal and employed by I-Safe, a non-profit corporation, from the Spring of 2002 until February 25, 2014, as the Chief Operations Officer. His annual salary rate was $110,000. A dispute arose between Shaw and I-Safe regarding Shaw's employment. Shaw claimed that he was not paid full wages for 2013 and 2014. Shaw also alleged that I-Safe did not pay him for accrued vacation hours at the time of his resignation.

Shaw took his dispute to a hearing before the California Department of Industrial Relations, Labor Commissioner. The hearing officer awarded Shaw $202,004.77. I-Safe appealed the Labor Commissioner's award by way of a bench trial in the Superior Court of San Diego County. To appeal the award, I-Safe posted an undertaking in the amount of $202,004.77.

At trial, Shaw again claimed that I-Safe did not pay him full wages for 2013 and 2014. However, the trial court observed that Shaw sought a changing amount of unpaid wages throughout the trial. For example, in his trial brief, Shaw asked the court to affirm the Labor Commissioner's award of $202,004.77, which included $98,539.23 in unpaid wages. During closing argument, Shaw's attorney requested $92,539.23 in unpaid wages. The next time he appeared in court, Shaw requested $84,890.69. Shaw also asked for $35,482.48 for payment of accrued vacation time, consisting of 671 hours at an hourly rate of $52.88. This amount differed from what Shaw claimed he was owed in his trial brief.

I-Safe countered that Shaw was overpaid wages for 2012 through 2014. Additionally, I-Safe maintained that Shaw had only accrued 19.28 vacation hours at the time he resigned, payable at the hourly rate of $21.15 for a total of $407.77. I-Safe also argued that its failure to pay the accrued vacation wages was not willful, and thus, did not violate Labor Code section 203. I-Safe's defense against Shaw's claim hinged on the existence of an oral agreement among Shaw, I-Safe chief executive officer Terri Schroeder, and I-Safe chief strategy officer Jonathan King. The three individuals allegedly agreed in September of 2012 to reduce their salaries to 40 percent. Regarding vacation time, I-Safe argued there were periods of time when Shaw was working part-time, and consequently, Shaw could not accrue vacation time during those periods as prescribed by I-Safe's vacation policy. I-Safe also maintained that Shaw failed to record numerous hours of used vacation.

The trial court acknowledged the case "was determined largely based on the credibility of the witnesses." To this end, it noted that portions of Shaw's and Schroeder's trial testimony lacked credibility. Also, the court lamented that "many of the numbers submitted during the course of the case do not add up." The court attributed this shortcoming to the fact that I-Safe was not making payroll for substantial periods of time, I-Safe entered into ambiguous agreements, and there existed "questionable accounting practices, corporate governance, and record-keeping." Nevertheless, the court made certain factual findings relevant to the issues before us.

Shaw's "100 [percent] annual salary rate was $110,000." I-Safe paid Shaw $41,820.86 in wages for 2013 and nothing in 2014. Shaw's last date of employment for I-

Safe was February 25, 2014. In September 2012, Shaw entered into an oral agreement with Schroeder and King to reduce the salary paid to each of them by I-Safe to 40 percent of their current salaries. I-Safe, largely at the direction of Shaw, did not implement the oral agreement in issuing payroll through the end of 2012. Both Shaw and Schroeder had been paid roughly 90 percent of their salaries in 2012, and Mr. King had been paid almost 90 percent. Therefore, the oral agreement to reduce Shaw's, Schroeder's, and King's salaries did not take effect until 2013.

Under the oral agreement, Shaw should have been paid $44,000 in 2013. However, he was only paid $41,820.86. Thus, I-Safe owed Shaw $2,179.14 for 2013.

Regarding 2014, Shaw should have been paid $3,666.66 for January, $1,833.33 for the first February pay period, and $1,184.62 for the additional seven days Shaw worked at the end of February. As such, I-Safe owed Shaw $6,684.61 for 2014. In total, I-Safe owed Shaw $8,863.75 in unpaid wages.

Based on testimony and exhibits proffered at trial, especially exhibit 18,[1] the court found that Shaw had accrued 445.91 hours of vacation time. The court calculated Shaw's hourly rate at the time he resigned as $21.15 an hour. Therefore, the court found that I-Safe owed Shaw $9,431 in unpaid accrued vacation.

The court also determined that I-Safe owed Shaw waiting time penalties under Labor Code section 203 in the amount of $5,076.90. In all, the court awarded Shaw

1 Exhibit 18 was an attachment to Schroeder's June 19, 2015 email.

damages in the amount of $23,371.65, plus interest under Labor Code section 98.1 as well as costs and reasonable attorney fees under Labor Code section 98.2, subdivision (c).

The court also decreed:

> "With respect to the undertaking, in the amount of $202,004.77, the Court orders that such portion of the undertaking that equals the total amount of this judgment be provided by the court to appellee/plaintiff, care of counsel, and any remainder be returned by the court to appellant/defendant, care of counsel. Such amounts are to be specified in the proposed judgment."

The court directed Shaw to prepare and submit the proposed judgment. However, I-Safe submitted two proposed judgments before Shaw submitted one. In I-Safe's second proposed judgment, I-Safe stated that it owed Shaw $23,371.65 plus interest in the amount of $6,134.03 under Labor Code section 98.1. It also stated that "[a]ttorney's fees and costs, if any, shall be awarded in an amount to be determined by the Court pursuant to Labor Code Section 98.2(c)[.]" Finally, the proposed judgment directed the court clerk to apportion the undertaking to provide Shaw, through his counsel, with $29,505.68, and return the remainder of the undertaking ($172,499.09) to I-Safe.

About a week after I-Safe filed its second proposed judgment, Shaw submitted a proposed judgment. Shaw's judgment largely mirrored I-Safe's, including the same calculation of interest under Labor Code section 98.1. The primary difference between the proposed judgments was that Shaw suggested that the court clerk hold the remainder of the undertaking (after paying Shaw his damages) so that any fees and costs awarded could be taken from the undertaking as well.

After a hearing on the matter, the court entered judgment mirroring I-Safe's second proposed judgment.

DISCUSSION

I

SHAW'S CHALLENGES TO THE JUDGMENT

Shaw raises several challenges to the judgment. He claims the court's "critical findings are belied by the actual evidence and also . . . the award made violates applicable law, even if the Court's factual findings are upheld." In this sense, Shaw's contentions that the judgment is flawed fall into two primary categories: the judgment was improper as a matter of law and substantial evidence does not support the judgment. As we discuss *ante*, the lack of a more complete record undermines Shaw's substantial evidence claims. (See *Gonzalez v. Rebollo*, *supra*, 226 Cal.App.4th at p. 977.) Also, Shaw's assertion that the judgment is legally incorrect glosses over the fact that Shaw did not raise any of the objections with the trial court that he complains of here. Indeed, in some instances, he proposed the very portion of the judgment he now argues is incorrect. As such, Shaw has, in some instances, invited the error he claims exists or forfeited his objection to the alleged error. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 (*Norgart*) [invited error]; *Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486 (*Hepner*) [forfeiture].)

For example, Shaw claims the court improperly calculated the interest as $6,134.03, "without explanation." He maintains the correct amount of interest should be $8,247.32. However, Shaw neglects to tell this court that the $6,134.03 "calculated" by

the trial court was the exact amount of interest Shaw stated was owed in his proposed judgment. The trial court further made sure that Shaw agreed with the $6,134.03 amount of interest. To this end, at the hearing on the judgment, the court asked, "It sounds as if there is agreement as to the prejudgment interest amount. Both parties are submitting $6,134.03; is that right?" Shaw's trial counsel responded, "Yes, Your Honor. While we, of course, have our issues with the underlying result, that calculation, we agree with." In response to Shaw's trial counsel's comment, the court reiterated that it was accepting the interest calculation that "both parties have computed[.]"

Thus, in light of the record, the trial court did not calculate the interest amount of $6,134.03, "without explanation" as Shaw insists. To the contrary, the court included the amount of interest calculated by Shaw and submitted in Shaw's proposed judgment. We also observe that this amount of interest proposed by Shaw is identical to the amount in I-Safe's second proposed judgment. And the court made sure that the parties agreed on this amount at the hearing on the judgment. Nevertheless, Shaw is now claiming that the amount of interest in the judgment was error, but that amount is the exact amount he submitted in his proposed judgment. In other words, the court awarded the amount of interest Shaw claimed was owed, the amount Shaw, himself, calculated. Thus, any error in the amount of interest in the judgment was invited error.[2] (See *Norgart*, *supra*, 21 Cal.4th at p. 403.)

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[2] In his reply brief, Shaw insists his trial counsel did not agree that $6,134.03 was the correct amount of interest, but merely "agreed . . . that the calculation, given the Court's decision, was accurate." This argument borders on nonsensical and misrepresents

In addition, Shaw maintains the judgment was improper because it did not allow for interest "going forward." To this end, under Labor Code section 98.2, Shaw contends that the judgment must include interest on the award until he is paid. Again, Shaw glosses over the fact that he never made any such argument to the trial court. His proposed judgment did not include such an interest calculation. He did not object to I-Safe's proposed judgment, which also did not include such an interest calculation. And, during the hearing on the judgment, Shaw did not argue that additional interest was needed in the judgment. Thus, on the record before us, Shaw forfeited this challenge to the judgment.[3] (See *Hepner, supra*, 52 Cal.App.4th at p. 1486.)

Next, Shaw contends the judgment orders an impossibility because it directs the court clerk to pay the awarded funds from the undertaking posted at the beginning of the case. He asserts the undertaking is merely a bond and not actual money from which the payment can be made. Finally, Shaw represents that the court clerk has not paid him yet out of the undertaking in any event. None of Shaw's arguments warrant reversal.

The concept of the court clerk paying Shaw's award out of the undertaking originated in the court's statement of decision. Both I-Safe's second proposed judgment and Shaw's proposed judgment included the procedure by which the court clerk would pay Shaw's damages. The only difference between the two proposed judgments was that

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the record. The amount of interest awarded in the judgment is the precise amount that Shaw submitted to the court in his proposed judgment. Alternatively stated, Shaw calculated the interest owed, which he now objects to.

[3] Perhaps, Shaw did not ask for additional interest to accrue until he was paid because the judgment contemplated Shaw receiving immediate payment from the court clerk out of the deposited undertaking.

in Shaw's proposal, the court clerk would retain the balance of the undertaking after paying Shaw his damages so that any attorney fees and costs would be paid out of the undertaking as well. In contrast, I-Safe's proposed judgment required the court clerk to return the remaining undertaking to I-Safe after paying Shaw his damages. Also, at the hearing on damages, Shaw did not contend that his award could not be paid out of the undertaking, but instead, argued, consistent with his proposed judgment, that the undertaking should remain with the court clerk so any subsequently awarded attorney fees and costs could be paid out of the undertaking as well.

Again, the record shows that Shaw's proposed judgment contained a provision (here, payment from the undertaking) to which he now challenges on appeal. Further, he did not object to the payment procedure that required the court clerk to pay his damages out of the undertaking. Thus, at the very least, Shaw has forfeited this objection here (see *Hepner*, *supra*, 52 Cal.App.4th at p. 1486) if he has not invited the alleged error altogether (see *Norgart*, *supra*, 21 Cal.4th at p. 403).

Although we conclude that Shaw's objection to the payment procedure in the judgment is forfeited, his claim that he cannot be paid out of the undertaking because it is not actually liquid is not yet ripe. There is no indication in the record that Shaw took the judgment to the court clerk and demanded payment from the undertaking. Nor is there any showing that the court clerk refused to issue any payment. In fact, because an undertaking was given, and Shaw appealed the judgment, the proceedings in the superior court are stayed. (See Code Civ. Proc., § 916, subd. (a).)

In addition to challenging the calculation of interest and the payment procedure in the judgment, Shaw argues that some of the court's findings of fact are not supported by substantial evidence. Specifically, he claims the court improperly used Shaw's final rate of hourly pay to calculate the amount owed for accrued vacation time. He further insists Shaw's final rate of pay was agreed to after the "majority of vacation time had accrued[,]" and as such, the application of the final payment violated Labor Code section 227.3 because it forfeited accrued vacation time. In this sense, Shaw attempts to frame this issue as a question of law. It is not.

Labor Code section 227.3 provides:

> "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness."

Below, the trial court's award for vacation time did not run afoul of Labor Code section 227.3. As the court explained in the statement of decision, it did not find Shaw's testimony credible about the vacation time issue. Instead, the court found I-Safe had a policy beginning on January 1, 2013 that no further vacation could accrue until an employee's total accrued vacation hours were fewer than 80. It then stated that "the most detailed, up-to-date, and credible evidence of vacation accrual for Shaw [was] found in the attachment to Ms. Schroeder's June 19, 2015 email (Exhibit 18) . . . ." Comparing

that exhibit to Shaw's change of status forms (offered by I-Safe at trial), the court found that 24 hours of used vacation time were missing from the spreadsheet. The court noted that the spreadsheet did not take into account the change in vacation policy effective January 1, 2013. Therefore, the court took the accrued vacation hours as of December 31, 2012 indicated on Exhibit 18, subtracted the 24 hours indicated on the change of status forms as well as 112 hours of vacation time Shaw used in 2013 and 2014 to reach a total number of accrued, unused vacation time of 445.91 hours at the time of Shaw's departure from I-Safe.[4] Then, per Labor Code section 227.3, the court multiplied the accrued, unused hours (445.91) by Shaw's final reduced hourly rate of $21.15. This is precisely what the statute requires. (See Lab. Code, § 227.3.)

Nevertheless, Shaw argues that the court's calculations operated as a forfeiture. To this point, he insists that the court was required to calculate the vacation pay using Shaw's hourly rate at the time he accrued the vacation time. This is not what the statute mandates. Labor Code section 227.3 clearly states that an employee is entitled to vacation pay at the employee's "final rate." (See Lab. Code, § 227.3.) The court determined Shaw's final rate of pay was $21.15 an hour. It multiplied that hourly rate by the 445.91 accrued, unused vacation hours. There was no forfeiture of accrued, unused vacation time.

Shaw's actual complaint regarding the court's determination of the amount owed for vacation pay is an indirect attack on the court's finding that I-Safe and Shaw entered

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4 Shaw does not challenge the calculation of the accrued, unused vacation hours.

into an oral agreement to reduce Shaw's annual salary to $44,000. Indeed, this substantial evidence challenge is underscored by Shaw's additional argument that the oral agreement to reduce Shaw's salary is not supported by the evidence. Again, Shaw tries to frame this issue as a purely legal one, arguing that there is inadequate consideration to enforce the oral agreement. (See Civ. Code, § 3391.)

In the statement of decision, the trial court explicitly stated the case was determined "largely based on the credibility of the witnesses." The court further noted there "was a dispute as to whether there was an oral agreement between Shaw, Ms. Schroeder, and Mr. King in September 2012 to reduce their salaries to 40 [percent]." While stating that "parts of Shaw's and Ms. Schroeder's testimony lacked credibility[,]" the court found that "[t]he most credible witness . . . particularly with respect to the oral agreement to reduce salary in September of 2012, was Mr. King." The court then found "credible the testimony that Shaw entered into an oral agreement with Ms. Schroeder and Mr. King in September of 2012 to reduce the salary paid to each of them by iSafe, Inc. to 40 [percent] of their current salary[,]" but determined the agreement did not become effective until 2013.

Shaw finds fault with the trial court's determination, contending that the court found the principals of I-Safe orally agreed to reduce their wages from I-Safe in late 2012 in exchange for ownership rights in some new for-profit companies. Shaw insists such a finding is not supported by the record because, at the time the for-profit corporations were created, the three principles "immediately had an equal interest in the [for-profit

companies] when they were formed." Thus, according to Shaw, there was no evidence of consideration for the oral agreements.

Shaw's argument is a classic substantial evidence challenge. In applying the extremely deferential standard of review of substantial evidence, we imply all necessary findings supported by substantial evidence (*Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1364; *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 991-992 and "construe any reasonable inference in the manner most favorable to the judgment, resolving all ambiguities to support an affirmance." (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 946.) "If more than one reasonable inference may be drawn from undisputed facts, the substantial evidence rule requires indulging the inferences favorable to the trial court's judgment." (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211.) We are required to accept all evidence which supports the successful party, disregard the contrary evidence, and draw all reasonable inferences to uphold the verdict. Credibility is an issue of fact for the finder of fact to resolve (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622), and the testimony of a single witness, even that of a party, is sufficient to provide substantial evidence to support a finding of fact (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614).

As its name implies, a substantial evidence review requires our analysis of the evidence submitted to the superior court. Often critical in such analysis is our review of what occurred at the trial. Here, we do not have the benefit of a transcript of the subject trial.

Where an appeal is presented to us with no reporter's transcript, the trial court's findings of fact and conclusions of law are presumed to be supported by substantial evidence, "unless the judgment is not supported by the findings or reversible error appears on the face of the [available] record." (*Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 207; accord, *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324-325; *National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521.) Put another way, "[w]here no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be conclusively presumed correct as to all evidentiary matters. . . . [I]t is presumed that the unreported trial testimony would demonstrate the absence of error." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992, italics omitted.) The general effect of this rule is that "an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Ibid*.)

In the instant matter, because of the lack of a reporter's transcript, Shaw's substantial evidence challenge must fail. We find no apparent error on the face of the existing appellate record. And the trial court could properly rely on the testimony of one witness to find the existence of an oral agreement to reduce Shaw's annual salary. (See *In re Marriage of Mix*, *supra*, 14 Cal.3d at p. 614.) Below, the trial court found King's testimony credible on the existence of the disputed oral agreement. Shaw ignores this finding and points us to the court's summary of a portion of Schroeder's testimony about creating the for-profit entities and claims that such testimony establishes that no consideration supports the oral agreement. Not so. The court was simply summarizing

Schroeder's testimony. Moreover, the court explicitly found that parts of Schroeder's testimony "lacked credibility" and specifically pointed to King's testimony as establishing the oral agreement to reduce Shaw's salary. Further, with the lack of any reporter's transcript, there is no way for us to evaluate Shaw's claim about the ownership interest of the subject for-profit companies and whether the court found that the ownership interest was the only consideration underlying the oral agreement to reduce salaries. As such, Shaw's substantial evidence challenge is not well taken.

II

ATTORNEY FEES AND COSTS

Having concluded that none of Shaw's challenges to the judgment has merit, we next turn to Shaw's claim that the court abused its discretion in awarding attorney fees and costs.

A. Background

Shaw filed a memorandum of costs, seeking to recover $4,836.16. I-Safe filed a motion to strike costs, arguing that Shaw's memorandum was not supported by any documentation, including invoices or receipts, justifying the amount of costs sought. Shaw opposed the motion to tax costs. As part of his opposition, he submitted the declaration of his trial counsel, which provided some explanation and documentary evidence for the claimed costs.

After entertaining oral argument and considering the motion to tax costs as well as the opposition to that motion, the court granted in part and denied in part the motion, ultimately awarding Shaw $3,228.98. As we discuss below, regarding the court's order

on the motion to tax costs, Shaw only challenges the court's striking of Shaw's claimed service of process costs in the amount of $1,500.

In addition to seeking costs, Shaw filed a motion for attorney fees under Labor Code section 98.2. Shaw sought a total of $104,771 in attorney fees, consisting of $85,300 of fees billed by Shaw's trial counsel, Daniel Mulligan of Jenkins Mulligan & Gabriel LLP[5] as well as $19,471 of fees for work performed by Mulligan's co-counsel from Steyer Lowenthal Boodrookas Alvarez & Smith LLP (Steyer firm).[6]

I-Safe opposed the motion for attorney fees, arguing the sought after fees included unnecessary, excessive, administrative (non-legal), and duplicative work. Also, I-Safe contended that certain time entries exaggerated the time needed to complete the described tasks. In addition to challenging the number of hours billed, I-Safe maintained that Mulligan's hourly rate was unreasonable. I-Safe further argued the use of the Steyer firm was unnecessary and not justified. And I-Safe noted the claimed fees were not reasonable because of Shaw's limited success at trial and lack of complexity in the claims alleged by Shaw.

Shaw filed a reply in support of his motion for attorney fees.

The trial court issued a very detailed minute order granting Shaw attorney fees in the amount of $46,062. In reaching its conclusion, the trial court explained:

> "The Court finds that [Shaw] has failed to provide any factual basis for the need for or reasonableness of co-counsel's fees. There is no

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5 Mulligan billed a total of 170.60 hours with an hourly rate of $500.

6 Multiple attorneys at the Steyer firm billed a total of 44.60 hours.

evidence presented to the Court to explain the division of labor between counsel, the skills or experience offered by the Steyer law firm, let alone the actual individuals who participated from the Steyer law firm, their backgrounds, years of practice, and hourly rates.

"In addition, the Court finds that plaintiff has failed to provide sufficient factual basis for the reasonableness of the $500 hourly rate sought for Mr. Mulligan with respect to this particular type of litigation in this community.

[¶] . . . [¶]

"The Court has determined that a multiplier of the lodestar figures in this case is appropriate in light of multiple factors, including: the fact that many of plaintiff's billing entries are vague, there is duplicative billing between Mr. Mulligan and co-counsel, and many of the entries appear to be unreasonable, particularly in light of the limited discovery taken in this case and the apparent billing for some clerical tasks. In addition, the Court is taking into consideration [Shaw's] limited success in the case. Although these types of cases often lack complexity, the Court is not discounting fees on that basis. As noted previously in the case, there was a level of factual complexity, due to the questionable accounting practices, corporate governance, and record-keeping for which both parties were responsible.

"Accordingly, the Court will use a multiplier of 60 [percent] with respect to Mr. Mulligan's hours, and the Court will not award any fees for the Steyer law firm's work based on a lack of factual basis. The result is: 170.6 x $450 x 60 [percent] = a total of $46,062 in attorney's fees."

B. Standard of Review

"An appellate court reviews a trial court's award of attorney fees for abuse of discretion." (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452.) The same standard is applied to a review of an award of costs. (See *Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1209.)

"A trial court may not rubberstamp a request for attorney fees," but rather "must determine the number of hours *reasonably* expended." (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 271.) "The court tabulates the attorney fee touchstone, or lodestar, by multiplying the number of hours reasonably expended by the reasonable hourly rate prevailing in the community for similar work." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1321.) The trial court retains discretion to award attorney fees in an amount less than the lodestar tabulation. (*Id*. at pp. 1321-1322.) Indeed, as our Supreme Court has observed, "To the extent a trial court is concerned that a particular award is excessive, it has broad discretion to adjust the fee downward or deny an unreasonable fee altogether." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138.) Further, trial judges are entrusted with this discretionary determination because they are in the best position to assess the value of the professional services rendered in their courts. (*Id*. at p. 1132; accord, *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096.)

An attorney fee dispute is not exempt from generally applicable appellate principles: "The judgment of the trial court is presumed correct; all intendments and presumptions are indulged to support the judgment; conflicts in the declarations must be

resolved in favor of the prevailing party, and the trial court's resolution of any factual disputes arising from the evidence is conclusive." (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 561-562.) We may not reweigh on appeal a trial court's assessment of an attorney's declaration (*Johnson v. Pratt & Whitney Canada, Inc.*, *supra*, 28 Cal.App.4th at pp. 622-623) and it is for the trial court "to assess credibility and resolve any conflicts in the evidence. Its findings . . . are entitled to great weight. Even though contrary findings *could* have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict. This is true whether the trial court's ruling is based on oral testimony or declarations." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479, fn. omitted.)

C. Analysis

Here, Shaw claims the trial court abused its discretion in reducing the amount of attorney fees he requested because the court's decision was "arbitrary." Yet, merely applying that label to the court's decision does not carry the day. Indeed, Shaw's argument overlooks the very detailed minute order explaining the court's reasoning in awarding Shaw $46,062 in fees.

For example, Shaw claims the court "concluded without explanation[] that *all* of the time incurred by the co-counseling firm . . . should be discounted entirely because there was no reason for co-counsel to have been employed." To the contrary, the court clearly explained why it did not award any fees based on the Steyer firm's billing on this matter. The court observed that Shaw had not provided any factual basis for the need for or reasonableness of the Steyer firm's fees. Further, the court noted that Shaw did not

provide any explanation about the division of labor between counsel or the skill or experience offered by the lawyers at the Steyer firm. In fact, it is not clear in the record that Shaw even identified the actual attorneys from the Steyer firm who worked on the case.

On appeal, Shaw does not directly address any of these findings by the court. He does not point to where in the record he explained the need to retain the Steyer firm or what purpose the attorneys from that firm served. Instead, he just asserts "[i]t is entirely unspecified why the staffing decision can be simply ignored[.]" Again, Shaw's argument completely disregards the court's detailed reasoning. On this record, there is no basis on which to find the court abused its discretion in denying Shaw any attorney fees for the Steyer firm's work on his case. (See *Ketchum v. Moses*, *supra*, 24 Cal.4th at pp. 1132, 1138.)

Next, Shaw insists that the trial court did not have the discretion to apply a negative multiplier and strike all of the Steyer firm's billed time. He makes this bald assertion without citing to any legal authority to support his position. As we discuss above, the court gave a detailed explanation why it did not award any fees for the work performed by the Steyer firm. In addition, the court explicitly stated why it was applying a negative multiplier: the billing entries were vague; there was duplicative billing; many of the entries appeared unreasonable in light of the limited discovery in the case; and the

attorneys billed for some clerical tasks.[7] There is nothing arbitrary about the court's reasoned decision to reduce Shaw's claimed fees.

Finally, we are not persuaded by Shaw's argument that the court did not take into consideration that the matter was taken on a contingency fee basis or that the negative multiplier cannot be justified by Shaw's "limited success" at trial. In essence, Shaw is upset with the trial court's proper and reasonable exercise of discretion in this case and is asking us to reweigh the evidence submitted to support Shaw's claimed attorney fees. This we cannot do. (See *Johnson v. Pratt & Whitney Canada, Inc.*, *supra*, 28 Cal.App.4th at pp. 622-623.) The trial court was in a much better position than this court to determine what fees were reasonable in this case. (See *PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at pp. 1095-1096.)

In short, Shaw had an opportunity to explain to the trial court why an award of over $100,000 in attorney fees was reasonable in this case. He failed to convincingly do so. Further, on appeal, he has not pointed to any part of the record that supports his claim that the court did not properly exercise its discretion in awarding less fees than Shaw requested. On the record before us, the court did not abuse his discretion.

We are similarly unimpressed by Shaw's argument that the court arbitrarily taxed his costs to disallow $1,500 for the services of an investigator to locate and serve two witnesses. The trial court found that "there was an insufficient showing" by Shaw

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[7] Again, Shaw does not address the court's stated reasons for discounting the amount of fees he sought. He simply declares the court's decision arbitrary. Simply labeling a trial court's use of discretion as arbitrary does not make it so.

justifying these costs. Shaw points out that his attorney, Mulligan, declared, in pertinent part:

> "In the course of preparing for trial, I decided on the witnesses to be called, in consultation with Mr. Shaw. Two witnesses were local but could not be readily located by me. Although I had email addresses, they stopped responding to my requests before trial and would not appear voluntarily. I then arranged to have them located and subpoenaed for trial. This required personal service. The entity performing the service was a licensed investigator who had to locate and serve both witnesses . . . . The investigator charged $1,500 for doing so."

Shaw also submitted the invoice from the private investigator for $1,500.

The trial court did not find the attorney declaration or the invoice sufficient to justify the $1,500 service fee. This determination is within the discretion of the trial court. (See *Gibson v. Bobroff*, *supra*, 49 Cal.App.4th at p. 1209.) Moreover, we cannot reweigh on appeal the trial court's assessment of an attorney's declaration. (See *Johnson v. Pratt & Whitney Canada*, *Inc.*, *supra*, 28 Cal.App.4th at pp. 622-623.) Further, the court's findings are entitled to great weight. (See *Shamblin v. Brattain*, *supra*, 44 Cal.3d at p. 479.) And, although we do not reweigh the evidence presented, on the face of the invoice submitted to justify the $1,500 costs, it is apparent what could have concerned the trial court. The private investigator billed for 10 hours of investigator service, but only described seven of those hours, which included two and a half hours for "background investigation and location," two hours for "skip trace," and two and a half hours for "surveillance." There is no explanation regarding why these activities were necessary. Nor does Shaw account for the missing three hours of time billed by the private investigator. Noticeably missing in the record is a declaration from the private

investigator justifying his $1,500 fee (which matched exactly the listed retainer in the invoice). On this record, we cannot say the court abused its discretion in striking the $1,500 service fee.

III

SANCTIONS

In its respondent's brief, I-Safe argues that sanctions are appropriate here because Shaw's appeal is frivolous. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*).) Shaw counters that filing an appeal without a reporter's transcript (like he did here) does not render an appeal frivolous. Shaw does not otherwise address the substance of his brief or the arguments he makes therein.

Our Supreme Court has cautioned that sanctions should be awarded "most sparingly to deter only the most egregious conduct." (*Flaherty*, *supra*, 31 Cal.3d at p. 651.) "Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal." (*Id*. at p. 650.) "Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Ibid*.)

Here, we find no evidence that Shaw prosecuted this appeal for an improper motive. Indeed, by filing the appeal, he has only delayed his own recovery on the judgment. And, although we conclude Shaw's appeal is without merit, we cannot say "any reasonable attorney would agree that the appeal is totally and completely without

merit." (*Flaherty, supra*, 31 Cal.3d at p. 650.) Shaw made some colorable arguments that may not have been presented in the clearest or most effective manner. That said, on the limited record before us, a lack of appellate acumen does not transform a meritless appeal into a frivolous one warranting sanctions.

DISPOSITION

The judgment is affirmed. The request for sanctions is denied. I-Safe is entitled to its costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

IRION, J.

GUERRERO, J.